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Supreme Court, U.S.
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No. 97-47

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

ELIZABETH RIDGEWAY, *et al.*,
Petitioners,

v.

PFIZER, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. Petitioners' Fifth Question Presented Seeks Review of the Denial of Their Motion to Intervene and Demonstrates the Legal Impact the Ruling Had on Their Standing to Appeal Other Orders.

Contrary to Respondents' argument, Petitioners have indeed sought review here of the Sixth Circuit's denial of their motion to intervene and the legal consequences that denial has on the issue of a class member's standing to appeal. The Class Member Petitioners received court approved notice that required Petitioners to either elect to opt out of the settlement (in which event they would have no right to make objections), or to remain in the class and thereby earn the right to file written objections within a set time.[1] Nothing in the notice mentioned that to appeal the eventual orders of the district court concerning the fairness hearing's procedure, approval of the class certification, or approval of the settlement, it would be necessary for Petitioners to formally move to intervene under Fed.R.Civ.P. 24.[2] Petitioners complied fully with the conditions, did not opt out, filed written objections to the class certification, the hearing's procedures and the settlement. Going one step

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1 According to the notice, only if Petitioners complied with the requirements of filing written objections timely, would their attorneys and they be allowed to participate at the scheduled fairness hearing (R.44).

2 Counsel for the class, who was charged with protecting the rights and options of the absent class members, was the draftsman of the notice approved by the court, and he did not include any reference concerning intervention.

further, Petitioners filed a formal motion "to be heard" which was granted by the district court. *Bowling v. Pfizer*, 143 F.R.D. 141,147(S.D.Ohio 1992).

Prior to and during the fairness hearing, the circumstances pointed to collusion on the part of class counsel and Defendants, and Petitioners sought discovery on this issue.[3] The district court judge who presided over the fairness hearing refused to allow either discovery or the introduction of evidence at the hearing concerning collusion or any of the issues covered by Petitioners' objections.[4]

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Evidence that was available and that would have been proven by competent evidence (if the court had not prohibited such a record from being made) showed that class counsel had been selected specially by Defendants to launch a "friendly" class action lawsuit that would, at a *bargain-basement-price*, give Defendants litigation peace with regard to a medical device-product that had been the subject of dozens of lawsuits around the globe. Class counsel played no role in structuring the settlement, had no knowledge about the product or the value (or worthlessness) of the settlement to the class, and in fact, took no merits discovery whatsoever prior to submitting the proposed settlement to the court for approval. There was an abundance of other available evidence that class counsel and Defendants forum-shopped to find a specific *friendly* judge who would approve their deal, and that there never was any intention or expectation that the case would be litigated (R.159, 190, 221).

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All depositions that were sought by Petitioners were denied, as was every effort by Petitioners to introduce testimony or other evidence at the fairness hearing. In fact, there was no *evidence* (as defined by the Federal Rules of Evidence) on any material Rule 23-related issue. Ironically, Petitioners had sought to raise issues that this Court found material and indeed governing in *Amchem Products, Inc. v. Windsor* ___ US ___, 1997 WL345149 (U.S.), No. 96-270 (6/25/97) at the fairness hearing, but the district court would hear none of it, and instead, precluded Petitioners from making a record which would have established that this was neither a proper class, nor an honest/fair settlement.

At the fairness hearing, Petitioners participated as if they were parties and were allowed to *argue* (but were prohibited from offering evidence to prove) their objections to: the procedure adopted by the district court; the manner in which the class certification ruling was made; and the fact that the district court would not allow the evidence that existed showing the settlement was neither fair nor fairly obtained, to be entered on the record. Ironically, the district court found in its Opinion approving the settlement that Petitioners did not meet their *burden* of proving fraud, even though it was the district court which denied Petitioners that opportunity.[5]

No party argued during the entire course of the fairness hearing, despite the active and indeed vociferous participation by counsel for Petitioners that Petitioners lacked standing, or that Petitioners were obliged to intervene under Rule 24. Rather, the district court and the parties treated Petitioners as parties, without mentioning or requiring intervention.

Within a few days after the district court entered its Order approving the settlement and class designation, Petitioners filed a Notice of Appeal. By appealing directly, Petitioners relied on two written Opinions of the Sixth Circuit that held class members had standing to file a direct appeal and were not obliged to intervene if they objected to a settlement or class designation. (*See, Sertic v. Cuyohoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th

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Bowling v. Pfizer, 143 F.R.D. at 152-155. No party was permitted to introduce evidence since the district court decided the entire matter on a record which contained nothing but *argument*. The district court further followed the curious practice of allowing the Proponents of the settlement to simply ignore arguments made by Petitioners' counsel concerning the evidence that could be adduced (if the hearing was evidentiary) that pointed to fraud and collusion.

Cir.1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir.1942). However, after Petitioners' Notice of Appeal had been filed, their counsel learned that Respondents intended to file a motion to dismiss the appeal on the grounds that Petitioners had not intervened. Petitioners promptly filed (before the time for appeal had expired) a motion to intervene in the district court.[6]

Petitioners had a pending class action in the Pennsylvania Court of Common Pleas. Because the Sixth Circuit would not allow a direct appeal and suggested Petitioners' remedy for the fairness hearing errors of the district court was a collateral attack, Petitioners attempted to use their state court action as the forum for such a collateral attack, and argued the *Bowling* settlement was not binding or valid on them, raising, in part, due process grounds, fraud and collusion; and requesting an evidentiary hearing in the state court to prove their allegations. Defendants in this case who defended also the Petitioners' Pennsylvania Court of Common Pleas case argued in response that the federal court's order in *Bowling* was *res judicata*, thus precluding any collateral attack. The Court of Common Pleas granted summary judgment to Defendants, rejecting the Sixth

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The district court held that it had no authority to rule on the motion to intervene because of the notice of appeal. Despite the earlier published opinions of the Sixth Circuit (mentioned above), in an unpublished memorandum, the Sixth Circuit dismissed the appeals of Petitioners on the grounds that as unnamed class members, they lacked standing to appeal. The Sixth Circuit cited *Guthrie v. Evans*, 815 F.2d 626 (11thCir.1987) and *Walker v. City of Mesquite*, 858 F.2d 1071 (5thCir.1988) for the proposition that Petitioners' remedy was to attack the order of the federal district court approving the settlement in a state court, collateral proceeding. This Court denied certiorari to Petitioners when they sought review of the Sixth Circuit's orders (R.424).

Circuit's suggestion of a collateral attack.[7]

During the fairness hearing much ado was made in the arguments of both Respondents that although the proposed settlement provided scant monetary relief to class members, it should be approved because Defendants had a so-called policy of not settling with any individual claimants on the one hand, and that the individual claimants had claims of little value due to both legal and factual reasons (143 F.R.D. at 162). Yet, shortly after the court approved the settlement, *The New York Times* and other media reported that over 300 persons who had opted out of the *Bowling* settlement had previously entered into a private deal to receive more than $34 million. Furthermore, this group of opt-outs who were each paid six figure settlements had, *prior to* the fairness hearing, threatened to disrupt the settlement and appear to have been bought off prior to the fairness hearing with the promise of the settlement. Therefore, the Proponents lied to the court and the absent class members when they represented that the class members' cases had no settlement value and that Defendants had a policy of not settling (R.39, 40).

In addition, in attempting to glorify this relatively worthless (to the class) settlement, the Proponents waxed on about the so-called *new* medical research for a diagnostic procedure to detect dangerous heart valves implanted in class members, and argued that only if the court approved the

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7 The Sixth Circuit held that class members had no standing to appeal directly rulings in Rule 23(b)(3) class actions that prejudiced their rights because they had a full remedy in their home state court where the order approving the class and class action could be attacked collaterally. The state court, however, held that the ruling of the district court was final and binding on the class members. In this Petition, Petitioners argue Rule 23 was not designed to create *dead ends* when it comes to protecting the rights of absent class members, which is what the Sixth Circuit created for Petitioners.

settlement would Defendants fund the research (R.325). However, again *after* the *Bowling* settlement was approved, *The New York Times*, *The Washington Post* and other media reported that, contrary to the statements of the Proponents made at the fairness hearing, for a long period of time, Defendant Pfizer already had been financing the very research into diagnostic procedures that the Proponents represented at the fairness hearing would only *commence* if the court approved the settlement . The newspapers reported further that the same diagnostic device that the funds in the settlement were intended to discover, had in fact, at Pfizer's previous expense, been developed and tested on human's with success. The newspaper articles reported also that Pfizer had required the scientists doing the research to *keep quiet* about their findings until after the *Bowling* settlement had been approved.

None of what was reported in the newspapers had been disclosed to the district court (or the absent class) during the fairness hearing, and in fact, the court's opinion approving the *Bowling* settlement relied on findings that the class members had no hope of settling their claims individually on the one hand, and that the research to find a diagnostic tool (that one the district court did not know had already had been invented at the time of the fairness hearing) would be of great benefit to the class.

Petitioners filed a Rule 60(b) motion when they learned of the new information that had been withheld deceitfully from the district court, and their motion pointed to other newly found evidence that established other fraud by the Proponents at the fairness hearing as well (R.315). At the time that Petitioners' Rule 60(b) motion was filed, their earlier-filed motion for intervention was still undecided and was pending. In the motion for intervention, Petitioners grounded their request on the post-settlement approval proceedings that were to occur (and which impacted on them materially), but they also asked that an order allowing them

to intervene relate back to when they first began to participate in the case on the grounds that they had been *de facto* interveners (in accordance with Sixth Circuit cite) on the one hand, and on the other, that the court and all parties had treated them as parties during the entire course of the proceedings.[8]

Finally, the district court got around to ruling on Petitioners motion to intervene, and it was denied. The denial of that motion to intervene was appealed to the Sixth Circuit without success, and it is the subject of this Petition for Certiorari.

In the Sixth Circuit, Petitioners argued that under Sixth Circuit authority, unless there are unusual circumstances (not present here), motions to intervene filed by a class member must be granted since the Sixth Circuit had precluded class members from filing direct appeals. *Bowling v. Pfizer*, Case No. 94-4322. Using that authority, Petitioners argued further that since their motion to intervene was pending when they filed their Rule 60(b) motion, if the Sixth Circuit reversed the district court's ruling denying intervention, Petitioners would thus have been allowed to intervene *as of the time that they had filed their motion to intervene*, and consequently, because the motion to intervene had been filed long before Petitioners had filed the Rule 60(b) motion, Petitioners would have in effect been interveners

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The district court, without ruling on the motion to intervene, entered an order denying Petitioners' Rule 60(b) motion. Petitioners appealed and advised the Sixth Circuit that they had a pending but still undecided motion for intervention. The Sixth Circuit, nonetheless, dismissed the appeal on the same ground that it had dismissed the original appeal: to wit, that class members have no right to appeal anything that a district court judge might do in a Rule 23(b)(3) class settlement or class designation.

when they filed their Rule 60(b) motion. Therefore, if Petitioners were reconstituted as interveners at the time that they filed their Rule 60(b) motion, the Sixth Circuit should reconsider its dismissal of their appeal of the denial of the Rule 60(b) motion since that dismissal was based solely on the lone ground that Petitioners had not been granted intervener status at the time the appeal had been filed. Without uttering one word concerning the merits of Petitioners' appeal of the denial of their motion to intervene, the Sixth Circuit simply affirmed every order issued in the case by the district court.

This case thus comes to this Honorable Court in a posture where the Sixth Circuit erred because it set up inpenetratable barriers for class members who were injured by the rulings of a district court in approving a class action, in its approval of the manner in which the district court conducted a so-called fairness hearing, and in the standard the Sixth Circuit allowed to be used for the approval of a class settlement.[9]

Accordingly, the issue on *certiorari* that Petitioners have standing to raise is whether a circuit court can essentially deny all means of review to class members.

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[9] The Sixth Circuit held that there were two routes of appeal for class members: a collateral attack in a state court or intervention. Yet, in this case, the Sixth Circuit dismissed the appeals of Petitioners, and then, without any explanation, affirmed the denial of their motion to intervene. To make matters worse, the Court of Common Pleas in Pennsylvania established that a collateral attack is not a proper or reliable way to raise errors by a district court in designating a class and approving a settlement. In short, the Sixth Circuit shirked its responsibility to review the district court's orders and passed the issue of reviewing its inferior court's orders to a state court - but the state court declined the Sixth Circuit's invitation. This left Petitioners with no appellate review of the district court's orders whatsoever.

Because the circuits are hopelessly split on what class members' rights of appeal are, and because more importantly, the Sixth Circuit and other circuits have demonstrated a palpable misunderstanding of the entire concept of class action jurisprudence and the court's duties in a class action, this Court must set standards and illuminate the issues. The abuse by a district court of absent class members' rights was recently addressed by this Court in *Amchem*. The district court in *Amchem* had adopted the same view as the district court and Sixth Circuit did in this case. In *Amchem*, this Court held that the way Rule 23 is drafted, requires that the class members' rights be paramount to the benefits to be achieved by a settlement that tramples the rights of absent class members. Accordingly, not only is it necessary for this Court to set forth the proper standard for when and how absent class members can appeal adverse and clearly erroneous rulings by the district court in a class action settlement proceeding, this case is an adjunct to the topics discussed in *Amchem*.

II. Respondents' Replies Are Too Generous in Describing the Fairness Hearing and the Fee-setting Procedures as Contested, Legitimate, Evidentiary, or Protective of the Due Process Rights of Class Members.

Little need be said about the gross exaggerations in Respondents' briefs where they mischaracterize the fairness hearing and fee-settling proceedings as legitimate, adversarial proceedings that were decided by evidence introduced in a setting that protected the due process rights of Appellants. The record itself shows the contrary to be true.

Nothing that qualified as evidence under the Federal Rules of Evidence was allowed to be introduced at either the fairness hearing or the fee setting proceeding. No depositions

or testimony was permitted. Judge Spiegel, who recused himself due to a personal relationship that favored class counsel, came back into the fee setting proceeding and entered an illegal order that determined its outcome. The fairness hearing was replete with the opportunity for Judge Spiegel to hear evidence of collusion by the Defendants and class counsel, but the judge protected his friend, the class counsel he summarily appointed, by barring any inquiry into the issues. Similarly, at the fee-setting proceeding, class counsel's conduct was again made *off limits*.

Respondents' generous descriptions of the fiasco in the court below, notwithstanding the record, reveals the truth.

CONCLUSION

The Court should grant Petitioners' *Writ of Certiorari*.

Respectfully submitted,

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